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IN THE

Supreme Court of the United States

October Term, 1965

No. 1003

LOIS BETTY BOUNDY,

Petitioner,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

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APPENDIX "A."

Opinion of the District Court of Appeal.

[2d Crim. No. 9650. Second Appellate District, Division One. Filed December 10, 1964, J. T. Alley, Clerk.]

The People of the State of California, Plaintiff and Respondent, vs. Lois Betty Boundy, Defendant and Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County. Allen T. Lynch, Judge.

For Appellant: Irving Glovin, Alvin B. Baranov.

For Respondent: Thomas C. Lynch and Stanley Mosk, Attorneys General; Doris H. Maier, Assistant Attorney General; G. A. Strader, Deputy Attorney General.

This is an appeal from a judgment of conviction of grand theft.

In an information filed in Los Angeles County on August 20, 1963, it was charged that defendant "within a twelve consecutive month period" prior to April 26, 1963, feloniously took $45,000 in money belonging to the Dakota Engineering Company in violation of section 487, subdivision 1, Penal Code. In a jury trial defendant was found guilty of grand theft. A motion for a new trial and probation was denied and defendant sentenced to the state prison. Later the court made an order suspending the execution of the judgment, vacated the order denying probation and placed defendant on probation for a period of five years upon certain conditions, some of which were that defendant spend 180 days in jail and make restitution "as determined by the Court in pending civil case." This appeal followed.

A résumè of some of the facts is as follows: In about 1958, Francis DeBartolo and two other persons organized the Dakota Engineering Company. DeBartolo was the president and a director of the corporation. Appellant worked for the company from that time until her arrest in May, 1963. At first she was a bookkeeper and later, when DeBartolo purchased all of the stock of the corporation, defendant became one of the directors of the company and its treasurer. The third Director after DeBartolo had purchased all the stock was Clair Christensen, the corporation attorney, who also served as the secretary of the company until shortly after appellant's arrest. The entire control of the corporation was with DeBartolo. In February, 1962, DeBartolo suffered an illness (a stroke) and was hos-

pitalized. Between March, 1962 and April, 1963 he had several heart attacks and spent considerable time at home convalescing. It was during this period of time when appellant illegally took the money of the corporation. During this time, Christensen signed the checks for the corporation which were presented to him by appellant, and prior to April of 1962, signed from 15 to 30 checks in blank at the request of appellant.

Corporation checks required any two of the three directors' signatures. The usual practice was for appellant to make out the necessary checks, sign the same herself and then secure the signature of either DeBartolo or Christensen. She was the office manager and performed all of the office work, and generally ran the business and would take and fill orders, receive and deposit checks, and make out checks for disbursements. For her work she received $500 per month plus a Christmas bonus of $100.

DeBartolo noted that in early 1963 there was an abrupt drop off in the business, gross sales having fallen off by 50%. In April, 1963 he requested an accounting firm to make a complete audit for the purposes of ascertaining the cause for the drop in sales and why and where the business was losing money. Edward Juline, a public accountant, who had made financial examinations and reports from the corporation's books since its organization was to conduct a detailed audit, the first to be made since the organization of the corporation. Juline testified in detail, illustrating his examination of the books, accounts and bank accounts with charts and schedules with reference to the shortage which he found in the corporation's accounts and which he traced to appellant's bank account. As an

expert, he expressed the opinion and conclusion that during the period from April 30, 1962 to May, 1963, there was a cash shortage in the corporation books of $48,616.50, and that of said amount, $44,797.82 could be traced to appellant's bank account. Checks in the sum of $3,818.68 remain untraceable and unidentified. Confirmations were made with the bank and customers of the corporation and a physical examination of the cancelled checks, check stubs, invoices, and inventory was made. A bank reconciliation schedule showed the existence of bank deposits made to the corporation's checking account which were not recorded by appellant in the corporation's books. Another schedule traced checks from the corporation's account to deposit tickets and bank statements of the appellant in the same bank. Checks charged to the corporation's bank account during the period of May 1, 1962 to April 30, 1963 but which were never located in the corporation's records were scheduled. It was demonstrated that as of April 30, 1962, the bank statement was reconciled and in balance with the corporation's books. A schedule of appellant's checking and savings accounts for the period of May, 1961 to May, 1962 showed deposits of $11,907.60, and from May, 1962 to May, 1963 there were deposits of $54,824.64.

As of April 30, 1962 the books of the corporation were in order and appellant prior thereto had made an entry in the check record for each check issued by the corporation and all cancelled checks were kept and filed. From April 30, 1962 to May 1, 1963 appellant received money in the form of checks from customers and deposited the same in the corporation's bank account, but did not record the receipt of the money in

the books. The total of such shortages for the year was $48,616.50.

It was Juline's opinion that appellant failed to record sales in the corporation's books in amounts sufficient to offset the amounts deposited in the bank and, similarly not shown on the corporation's books. The corporation's books were in balance, but they could not be reconciled with the bank records.

The accountant identified 36 transactions during the crucial period in which checks were drawn on the banking account of the corporation as shown by the bank records and identical deposits on the same dates were made in the appellant's bank account by deposit of checks in such amounts. None of these 36 checks were recorded in the corporation's books and the checks themselves were never found. In the check record of the corporation, maintained by appellant, there were missing numbers imprinted serially numbered check books as to stubs and the checks themselves. Juline asked appellant about the missing cancelled checks, and she, at one time, stated that she did not know where they were. As heretofore indicated, prior to April, 1962 appellant had retained all cancelled and voided checks.

At the time of appellant's arrest, officer Carpenter recovered from her apartment twelve checkbooks and she stated to the officer "Those are my books." The numbers of checks which were missing from the corporation's books were found noted in appellant's personal check record with respect to amounts which corresponded to checks charged against the corporation's bank account and deposits to appellant's account. Juline stated that it was his opinion that checks drawn on

the corporation's account appeared and were deposited in the appellant's bank account.

In a talk with Juline, Christensen and Art Peterson on May 20, 1963 the appellant first stated that the missing checks were in a box which she stated she had given to Juline. When informed the checks were not there, she then said that she had destroyed them. On the next day she was told of the amount of the shortage and she asked that Juline not tell DeBartolo. She attempted to borrow money from the bank and from the accountant in order to repay the amount of the shortage. She refused to explain the deposits to her bank account and said the money "came from somebody else" or that it was "confidential." On the next day she did raise some money and turned it over to the accountant. When she was placed under arrest at her apartment and told of the grand theft charge she said "you won't give me a chance to pay it back," stating, further, that she had already paid some and would pay back another $30,000. A search of the apartment resulted in the finding of 12 checkbooks (heretofore mentioned) under the bed. She made an effort to push the box further under the bed when one of the officers picked it up. She apparently was given an opportunity to, and did, telephone to her attorney from her apartment. She was then taken to jail.

In an interview at the police station, her talk was recorded on tape. The tape was introduced into evidence. She, at that time, explained that she sometimes got drunk and would get things mixed up and place deposits in her bank account which belonged to the corporation, that she had paid back $12,000 and would pay back another $30,000 the next day, that the missing

checks from the serially numbered checkbook of the corporation was due to an error by the printer. That explanation conflicted with her other statements to the effect that she had destroyed the missing checks. Some of the questions and answers on the tape recording are set forth in the footnote.[1]

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[1]"Q. Well, over the period of time, it's my understanding that there is about, in the neighborhood of $50,000 fouled up.

"A. They say that, but I can't figure it out and I can't see the books and they won't show the figures to me and won't show me where I made my mistake and let me see anything.

"Q. Well, let's go to what you said yourself, and see if we can understand this part of it and then maybe a reason for that. When you were first arrested at the apartment you said — I know I owe them $30,000 —

"A. That is what they said.

"Q. You said this yourself. You said you owed them about $30,000; that it was going to be 'straightened out tomorrow.'

"A. Yes, that is what they say and I was going to get it tomorrow. I had an appointment with the attorney tomorrow afternoon and made special arrangements with my girl friend to drive me over because he's way over there and I'm here, the cab fare is no cheap fare.

"Q. Well, were you going to come up with $30,000 tomorrow to pay them back? I don't know, I have to ask.

"A. Now let me ask you this. What is the point of telling you fellows all about this? Because now I'm not in a position to be talking to you. My attorney advised me not to talk to you but I have been kind enough to tell you the story to give an idea what Frank is.

"Q. We're trying to understand it. We appreciate you talking to us.

"A. How far is this going and where is it going?

"Q. Well, we have to understand it to be able to —

"A. But who are you going to be talking to afterwards?

"Q. This whole thing is going to be submitted to the District Attorney's office.

". . .

"Q. This $12,000 that you paid back, where did you get this money? Is this money that you had gotten through your mess-up in handling the books?

A. I got it from friends.

Q. You got that money from friends? This wasn't anything to do with the mess-up in the books?

"A. No, I got it from friends, who came to my rescue, but they can't give me any more, they gave me what they could.

At the trial, appellant admitted that she had falsified the corporation's books and that the monies amounting to about $48,000 were deposited in her own account, but that the money was a gift to her from DeBartolo and that she had been requested by DeBartolo to deposit the money in her account for the purposes of saving on

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Eventually, I'll pay them back, they know I will, no matter how long it takes. I have a few friends.

"Q. How about the $30,000, now what were you planning on doing?

"A. All I know is that I'm going to sell my apartment, that is all I can do.

"Q. The apartment you are living now?

"A. Yes.

"Q. I thought that belonged to Frank?

"A. The apartment may but not the rest.

"Q. The stuff inside belongs to you?

"A. If he steps in and takes anything, then look out.

"Q. Your door is locked up there.

"A. I know one thing he is dying to get his hands on —"

During the questioning at the jail, one of the officers stated to appellant that he wanted to see if her attorney had called at the jail as yet. He ascertained that her attorney had not arrived and said to her:

"Q. Your attorney hasn't called or come in yet, so evidently he's still working on it. He's got to get a paper, signed by a commissioner or a judge."

Finally, the tape records the following:

"Q. Well, your attorney's here and we've got to do a couple more things and see if he can get you out of here. Just one question I want to ask you.

"A. Go ahead and ask it.

"Q. Nobody has mistreated you here?

"A. You haven't mistreated me. It's just that you blackened my record now by bringing me here. Now, what is this going to do with my credit accounts? Now, I have a high standing in my credit accounts.

"Q. When this is all finished and squared away, why your attorney can help you straighten out.

"A. Well, I have got a record now. Can you erase that? That's what I am going to hold against you.

"DETECTIVE CHIABAUDO: Well, you've got to look at it this way. That's our job.

"Q. Let's go out and see what your attorney has to say here."

corporation income taxes. DeBartolo stated that he did not authorize the falsification of the books and that he made no gift to appellant other than the $100 Christmas bonus.

Appellant now asserts that (1) the evidence is insufficient to establish all of the elements of theft by embezzlement, (2) the court erred in restricting appellant's cross-examination of DeBartolo and Juline, (3) the court erred in admitting her statements without sufficient proof of the corpus delicti, (4) the court erred in giving and refusing certain instructions and the prosecutor was guilty of prejudicial misconduct in misstating the evidence to the jury. She further asserts that under the ruling in *Escobedo v. Illinois*, 12 L. 2d 977, 84 S. Crt. 1758, and *People v. Dorado* (California) she should not have been examined by the police and the tape recording of her statements at the police station were not admissible in evidence.

It is permissible simply to charge grand theft as was done in this case. See 1 Witkin, California Crimes, section 366, page 342, where it is stated "the prosecution is not required to elect the particular kind of theft which it will attempt to prove" and "no longer need the legal profession puzzle over fine distinctions between embezzlement, larceny and other elements of stealing. The crime is complete if a man takes property not his own, with intent to take it." and further that, " 'it is immaterial whether or not they [the jury] agreed as to the technical pigeonhole into which the theft fell.' [Citations.]"

The particular case does not necessarily have to fit into one category to the exclusion of others.

In this case, appellant undoubtedly knows just what method and procedure she used and she probably also knows what happened to the missing checks. The fact that the checks have never been found, however, is not fatal to the prosecution. Appellant gave different versions of what occurred and the jury could have believed part or none of her stories. It may have been that appellant used the checks signed in blank by Christensen, or the endorsement of the name of the payee may have been forged by appellant followed by her endorsement — the checks may have been made out to her and such fact kept from the co-signer which went undetected by the bank. The exact method she used to steal from the corporation and DeBartolo is not all-important. The important thing is, did she steal about $48,000 during the time in question? She was a $500-per-month bookkeeper and officer-manager and deposited about $48,000 into her own account during the time in question. DeBartolo made no gift to her (excepting the $100 Christmas bonus), the corporation's books were falsified by her during the year by shorting sales and failing to record some $48,000 in checks drawn on the corporation's bank account and the deposits to her account were traced to the unrecorded checks and missing check numbers which she had noted in her personal check records.

Up to the time of trial, when she said there was a gift of the money, the evidence is clear that there was no mistake and no gift. There had been without question unauthorized transfers of the corporation's money into her hands. The corpus delicti was established when it was shown that the money was missing and no one was given permission to take it. (*People v. Brooks*,

154 Cal. App. 2d 631; *People v. Johnson,* 153 Cal. App. 2d 870; *People v. Theodore,* 174 Cal. App. 2d 237.)

There was without question a relationship of trust and confidence imposed in appellant by DeBartolo, she had substantial control of the funds of the corporation, she evidenced a fraudulent appropriation of the money and her intent and actions are clear. It is not required that the actual money be in the actual possession of the embezzler. "It is sufficient to show that while an accused was not in actual possession of the money it was under his control in the sense that it was under his direction and management. . . ." (*People v. Hess,* 104 Cal. App. 2d 642, 672. See also *People v. Holtzendorf,* 177 Cal. App. 2d 788; *People v. Forman,* 67 Cal. App. 693; *People v. Swanson,* 183 Cal. App. 2d 424; *People v. Coggan,* 155 Cal. App. 2d 42.)

Her contradictory statements indicate a consciousness of guilt and an attempt at times to conceal her crime. She was uncooperative during the audit, she, in effect, admitted her guilt to the police by returning $12,000 and suggesting the securing of $30,000 more to further repay the obligation. People who are honest and innocent do not pay over $12,000 forthwith and suggest the payment of another $30,000 to be made the day following to an employer who finds a shortage of $48,000 in his company records.

There was no improper restriction of appellant's cross-examination of DeBartolo. She attempted to show a close relationship between herself and DeBartolo and that, as a consequence thereof, he had made a gift to her of the money in question. He testified on cross-examination that the relationship was not a close per-

sonal relationship. She attempted then to introduce a statement made by DeBartolo in a deposition in a civil suit. The statement is not in the record, but apparently DeBartolo said: "Well, if she has friends, I will ask this question. Why did she stick to me like a mustard plaster for six solid years, and I couldn't go any place but what she wouldn't tag along, and I know because I spent most of my time with her and she never went to see any friends." DeBartolo had previously testified that she had accompanied him on trips and they were together a considerable part of the time, that he took her out to dinner — in other words, there was no denial that their association was frequent, but he did deny that there was any close personal relationship.

Any statement offered for impeachment purposes must be clearly inconsistent with or contradictory to the prior testimony of the witness. (See Witkin, California Evidence, §664, p. 702-703, and cases cited; *People v. Atchley*, 53 Cal. 2d 160.)

We think the statement was not contradictory nor inconsistent with the previous testimony, but even if it was, the error was not prejudicial under the facts of this case.

There was no error in refusing to admit into evidence matters relating to DeBartolo's tax liability. The court did permit the appellant to go into the fact that the decrease in the amount of sales shown on the books of the corporation would reduce the amount of the income tax of the corporation to that extent since there would be a reduction of that income. The court did refuse, however, to bring out the exact amounts by which the corporation's income tax would be affected. There was no prejudicial error in this, and appellant had cited

this court to no authority holding that is prejudicial error. Furthermore, there was no showing made as to the relevancy of the evidence under the circumstances.

Appellant requested an instruction.[2] She now contends that it was error for the court to refuse to give such instruction. A reading of the proposed instruction demonstrates that it is faulty and should not have been given under the circumstances. Among other things, it assumes facts not in evidence. (*People v. Jones,* 184 Cal. App. 2d 464; *People v. Best,* 172 Cal. App. 2d 692; *People v. Darnell,* 107 Cal. App. 2d 541; *People v. Garcia,* 124 Cal. App. 2d 822; *People v. Hill,* 76 Cal. App. 2d 330.)

Appellant further argues, relative to the prosecutor's misconduct, that in his opening statement the prosecutor said that the defendant was entrusted with the funds of the corporation when, in fact, the defendant was not so entrusted with such funds because it took two signatures before a check could be cashed. The statement was not improper under the circumstances for it was not necessary for the defendant to have the exclusive control of the funds before she could be guilty of theft and she had enough control that she made away with about $48,000 of the corporation's money. The prosecutor speculated in his argument as to how the appellant probably obtained the money from the corporation. The checks were never found and all the

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[2]"If you find that the checks deposited into the defendant's bank account were the checks of Dakota Engineering, Inc., and if you find that the checks were made payable to defendant, and if you find that the checks were signed by any authorized signatories of the corporation, then you are instructed that the defendant received the checks with authority and was legally in possession thereof and legally entitled to the proceeds, and that no crime was committed at all."

prosecutor did was to mention several of different ways by which the appellant could have gotten the corporation's money into her account. He was simply presenting to the jury legitimate inferences which could properly be drawn from the evidence. (See Witkin, California Criminal Procedure, §444, p. 446, and cases cited.)

In *Escobedo, supra,* 12 L. ed. 2d 977, 979, the court said: "The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright, 372* U.S. 335, 342, 9 L. ed. 2d 799, 804, 83 S. Ct. 792, 93 A. L. R. 2d 733, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation."

In the cited case the defendant asked to talk to his attorney before being required to make any statement. The attorney tried to talk with defendant before he made any statement. The police in *Escobedo* told him that his attorney did not want to talk with him which was an untruth and "notwithstanding repeated requests by each, petitioner [Escobedo] and his retained lawyer were afforded no opportunity to consult during the course of the entire interrogation." The court further said in *Escobedo* (p. 986): "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interroga-

tions that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 US, at 342, 9 L ed 2d at 804, 93 ALR2d 733, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

A fair reading of the transcript in the case at hand indicates that the facts of this case and the facts in Escobedo are in nowise similar. No useful purpose would be served in extending this opinion and pointing out the multitude of differences.

The appellant was found guilty upon substantial evidence. There is no reversible error in the record.

The attempted appeal from the sentence, the verdict and the order denying a motion for a new trial are, and each is, dismissed.

The judgment is affirmed.

Fourt, *J.*

We concur:

Wood, *P. J.*

Lillie, *J.*

Certified for non-publication in Official Reports under Rule 976.

Wood, *P. J.*

Fourt, *J.*

Lillie, *J.*

Clerk's Office, Supreme Court.
4250 State Building

San Francisco, California 94102
February 3, 1965

Hearing Denied

In re: 2nd Criminal No. 9650. People v. Boundy.

Respectfully

William I. Sullivan
Clerk